

Ann Arbor Fire Protection, Inc. and Donald Tisdale and Larron Hughes

Sprinkler Fitters and Apprentices, Local Union No. 704 and Donald Tisdale and Larron Hughes.
Cases 7-CA-32743(1), 7-CA-32743(2), 7-CB-9036(1), and 7-CB-9036(2)

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On May 13, 1993, Administrative Law Judge Hubert E. Lott issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent Union and the Respondent Employer each filed opposition briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge found, and we agree, that there is no merit in the complaint allegation that the Respondents enforced a contract clause providing that members of the Respondent Union would be the last to be laid off. However, the judge did not make a specific finding on the complaint allegation that the maintenance of the clause encourages membership in the Respondent Union in violation of the Act. The General Counsel has excepted, inter alia, to the judge's failure to find a violation for maintaining the contract clause. We agree with the General Counsel.

Article 14, section 62 of the Respondents' collective-bargaining agreement provides, in pertinent part: "In the interest of maintaining and preserving employment in the area in which work is to be performed, when an employer lays-off on a job, Local 704 members shall be the last laid-off." The Respondents' only defense to the allegation that maintenance of this clause unlawfully encourages membership in the Respondent Union is that the clause has never been enforced.

The provision, on its face, requires Ann Arbor to base layoffs on union membership or nonmembership. The requirement that an employer give preference in retention of employment to members of the Union unlawfully restrains and coerces employees in the exercise of their Section 7 rights. *Bricklayers Local (Den-*

ton's Tuckpointing), 308 NLRB 350 (1992). Thus, the members-laid-off-last provision is unlawful on its face; and the Respondents violated the Act by maintaining it in their collective-bargaining agreement. Because the essential vice of the provision is that its maintenance in the collective-bargaining agreement unlawfully restrains and coerces the Section 7 rights of all employees, the Respondents' defense of lack of enforcement is without merit. *Id.*

Accordingly, we find the Respondent Employer and the Respondent Union have violated Section 8(a)(3) and 8(b)(1)(A) of the Act, respectively.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that

A. Respondent Ann Arbor Fire Protection, Inc., Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a provision in the collective-bargaining agreement with Sprinkler Fitters and Apprentices, Local Union No. 704 that requires it to give preference in retention of employment during layoffs to employees based on membership or nonmembership in Local Union No. 704, except to the extent permitted by Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Ann Arbor, Michigan, copies of the attached notices marked "Appendix A" and "Appendix B."² Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed respectively by the Respondent Employer's and the Respondent Union's authorized representatives, shall be posted by the Respondent Employer immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

¹The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Forward to the Regional Director for Region 7 signed copies of the notice for posting by Sprinkler Fitters and Apprentices, Local Union No. 704 for 60 consecutive days where notices to members are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. Respondent Union Sprinkler Fitters and Apprentices, Local Union No. 704, Livonia, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining a provision in the collective-bargaining agreement with Ann Arbor Fire Protection, Inc. that requires the employer to give preference in retention of employment during layoffs to employees based on membership or nonmembership in Local Union No. 704, except to the extent permitted by Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices and meeting halls in Livonia, Michigan, copies of the attached notices marked "Appendix A" and "Appendix B."³ Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed respectively by the Respondent Employer's and the Respondent Union's authorized representatives, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Forward to the Regional Director for Region 7 signed copies of the notice for posting by Ann Arbor Fire Protection, Inc. for 60 consecutive days where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

³ See fn. 2, above.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain a provision in the collective-bargaining agreement with Sprinkler Fitters and Apprentices, Local Union No. 704 that requires us to give preference in retention of employment during layoffs to employees based on membership or nonmembership in Local Union No. 704, except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ANN ARBOR FIRE PROTECTION, INC.

APPENDIX B

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain a provision in the collective-bargaining agreement with Ann Arbor Fire Protection, Inc. that requires the employer to give preference in retention of employment during layoffs to employees based on membership or nonmembership in Local Union No. 704, except to the extent permitted by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SPRINKLER FITTERS AND APPRENTICES,
LOCAL UNION NO. 704

Joseph Canfield, Esq., for the General Counsel.
Melissa Jackson and David Houston, Esqs., for the Respondent Company.
J. Douglas Korney, Esq., for the Respondent Union.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge. This case was heard in Detroit, Michigan, on October 21, 1992, on unfair labor practice charges and amended charges filed on Jan-

uary 3 and February 27, 1992. A consolidated complaint issued February 27, 1992, alleging that the Company and the Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act.

Respondents' answers to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties.

On the entire record, and based on my observation of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent company is a corporation with an office and place of business in Ann Arbor, Michigan, where it is engaged in the building and construction industry as a contractor installing fire protection equipment. During the calendar year ending December 31, 1991, the Company derived revenues in excess of \$1 million. During the same calendar year, the Company purchased and received at its Ann Arbor facility goods valued in excess of \$50,000 directly from points outside the State of Michigan.

The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the parties admit, and I find, that Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Sprinkler Fitters and Apprentices Local 669 is located in Landover, Maryland, and is a "road local," having jurisdiction in all parts of the country except in some of the larger metropolitan areas where members are granted their own charters. Jurisdiction of Local 704 encompasses the Detroit Metropolitan area, including Wayne, Macomb, Oakland, and Washtenow counties. Both Locals belong to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (U.A.). Ann Arbor Fire Protection, Inc. (A.A.F.P.) has a collective-bargaining agreement with Local 704.

Charles Giles testified that he is a member of Local 669 and worked for A.A.F.P. from October 1990 to July 1991 when he was laid off. While he worked in Metropolitan Detroit, he was not a member of Local 704 but worked as a "traveler" out of Local 669. He stated that he worked with Don Tisdale and Larron Hughes at the Ford Motor Company and was the first to be laid off because work was nearing completion. At the time of his layoff, he testified that he asked Don Quick, his foreman and a stipulated supervisor, if Don Tisdale and Larron Hughes were being laid off. According to Giles, Quick replied that they wouldn't be laid off if they cleared into 704 (i.e., became members of 704). He had no knowledge of other employees laid off.

Larron Hughes and Donald Tisdale worked as travelers out of Local 669 in Local 704 jurisdiction. They were sent to work for R&R Fire Protection by Local 704 in April 1987. They remained employed until about March 1988 when they were laid off. They were recalled by R&R in June 1988 and

worked until May 1989. They were immediately sent to A.A.F.P. where they worked until they were laid off on July 12, 1991. Both were rehired on July 13, 1992, and were working for A.A.F.P. at the time of the hearing.

Hughes testified that approximately 2 weeks before his last layoff, A.A.F.P. Superintendent Wayne Evely told him that the Company had to make a cutback and that travelers would be the first to go. He was getting pressure from the Union to lay off all travelers. He was not being laid off because of his work skills or his record. Two days later he called A.A.F.P. President Sam Callen to inquire about a job. According to Hughes, Callen told him that he wouldn't be laid off if he became a member of Local 704. Callen also told him to contact Superintendent Tom Overmeyer at Action Fire Protection (owned by Callen) in Toledo to see if Overmeyer would employ him. Callen also said he was getting pressure from the Union to lay off travelers. Hughes contacted Overmeyer who offered him a job for 2 weeks, which he refused. He also testified on cross that if he took the job at Action Fire Protection, he would not be eligible for supplemental unemployment benefits.

Tisdale testified that on July 8, 1991, Foreman Don Quick told him the Union was putting pressure on the Company to lay off travelers but if he cleared into 704, he wouldn't be laid off. On the day he was laid off, Bill Evely told Tisdale he was sorry to see him go but the Union was pressuring the Company to lay off travelers. Tisdale called Callen, who told him that if he was a member of Local 704 he would have a job.

Sometime in July 1991, both Hughes and Tisdale talked to Local 704 Business Manager Pat Devlin about transferring into Local 704. Devlin told them they needed to have transfer cards from Local 669 to Local 704 and that they had to appear before the executive board. On September 11, 1991, they met with the executive board and were informed that in accordance with the U.A. constitution, they had to submit a signed statement to the local union that they were permanently changing and moving their domicile and residence to the territorial jurisdiction of the local union into which they are transferring. On October 8 and 11, Hughes and Tisdale submitted the required statement to the Union. In December 1991, Devlin met with Hughes and Tisdale and informed them that he was ready to sign their transfer cards. Both men wanted to know if being a member of Local 704 guaranteed them a job. Devlin said no and both men requested the return of their transfer cards (refused to join Local 704).

Both Tisdale and Hughes received supplementary unemployment benefits until they returned to work on July 13, 1992.

William Evely testified that he hires workers directly and not through the union hall. He stated that he laid off Hughes and Tisdale for lack of work, which occurs all the time when jobs are completed. He stated that he laid off Local 704 members while retaining travelers and never received a union grievance over this although the collective-bargaining agreement (art. 14, sec. 62) calls for laying off Local 704 members last.

Evely testified that he told Hughes he was being laid off because of lack of work. Hughes asked if it was because he was a traveler and Evely said no. He never told Hughes that travelers were the first to go. He never told either Hughes or Tisdale that they would not be laid off if they were Local

704 members and that their not being Local 704 members did not enter into his decision. But he did tell Hughes there were pressures.

Everly said that some time in the past Devlin asked him to lay off travelers several times but Everly told him that he had work for the travelers, that he was not laying them off, and that he would lay them off, "when I am damned well ready."

Everly testified that in laying off employees he ranks them according to their skills, abilities, and dependability. He then chooses the employees who rate last as the first to be laid off.

Samuel Callen testified that he had a collective-bargaining agreement with Local 704 but his company has never gone through the Union for employees. Ninety percent of his employees are hired directly. He selects employees for layoff based on their abilities. He laid off Hughes and Tisdale for lack of work not because they were travelers. Neither Hughes nor Tisdale were replaced by Local 704 members.

Callen testified that periodically Devlin would ask him to lay off travelers but he always told him that he lays off people when he is ready to lay off people and the Union never took any action under the contract when he laid off Local 704 members instead of travelers.

After Hughes and Tisdale were laid off, Callen testified that he offered them work at another of his companies in Toledo but they did not want the job so someone else was hired. He never told Hughes or Tisdale they wouldn't be laid off if they cleared into Local 704.

Pat Devlin, business manager for Local 704, testified that the Union has no hiring hall or referral service. Members get their own jobs and then inform the Union where they are working. He testified that the Union never enforced the contract provision requiring 704 members to be laid off last. He also testified that Local 704 has 285 members of which about 65 were not working on July 15, 1991. In June 1990, the Union had 25 travelers in town of which 10 were working for A.A.F.P. In January 1991, five travelers were working at A.A.F.P. and after July 1991, no travelers were working at A.A.F.P.

Devlin testified that both Tisdale and Hughes were informed of the residency requirements for membership into Local 704. On October 8 and 11, both submitted the required written statements. After that he told both Hughes and Tisdale he would sign their transfer cards. Both wanted a guarantee of work if they joined Local 704. Devlin told them that he couldn't guarantee them work because he had 65 members not working at the time. Both refused to join Local 704.

The Company submitted a chart showing the hire dates, layoff dates, and recall dates of Local 704 members and travelers. This chart shows that on June 8, 1990, the Company laid off four travelers and three 704 members. Two travelers were recalled on October 8, 1990, and again laid off in January 1991. On June 15, 1990, the Company laid off one traveler and three 704 members. On June 25, 1990, one 704 member was recalled. On January 4, 1991, five travelers and four Local 704 members were laid off. On March 4 and 15, 1991, five Local 704 members were laid off. Of these five, one was recalled in May 1991 and laid off again on September 19, 1991. Three others were recalled in April, May, and June 1992 and two were laid off again in July and August 1992. On July 3 and 12, 1991, three travelers (including

Hughes and Tisdale) and five 704 members were laid off. One 704 member was recalled in December 1991 and laid off January 3, 1992. Another 704 member was recalled and laid off three times. Tisdale and Hughes were recalled July 13, 1992. After these layoffs, one traveler and one 704 member were laid off in July 1991.

Analysis and Conclusions

Paragraph 46 of the collective-bargaining agreement states that the Employer retains the right to hire its employees while paragraph 60 states that the employer can only hire employees if the Union is unable to furnish it with members. However, the uncontradicted evidence shows that the Union does not operate an exclusive hiring hall. In fact it doesn't even have a referral service. Accordingly, I can find no violations of Section 8(b)(1)(A) and (2) for refusing to refer Hughes and Tisdale as alleged in the complaint. *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419 (1991). It is therefore recommended that these allegations be dismissed.

The complaint alleges violations of Section 8(b)(1)(A) and (2) because the Union refused to accept transfer cards from the Charging Parties. The undisputed evidence supports a finding that after the Charging Parties complied with the Union's constitutional requirements, the Union (Devlin) agreed to sign their transfer cards but the Charging Parties refused to join Local 704 because Devlin could not guarantee them a job. Accordingly, I will recommend dismissal of this allegation.

The complaint further alleges that Respondents enforced a contract clause which provides that members of Respondent would be the last to be laid off. While this clause is in the collective-bargaining agreement, I find that the evidence, and especially the uncontested documented layoffs, prove just the opposite. The evidence shows that at least since 1990, the Union has made no attempt to enforce this contract provision and according to Devlin's uncontradicted testimony the Union has never enforced this provision. Accordingly, I recommend dismissal of these allegations.

The only issue remaining is whether Respondents caused the layoff of the Charging Parties because they were not members of Local 704. Although there are serious credibility conflicts over the reason for the layoff, certain uncontradicted facts stand out. The Union never enforced the contract provision favoring Local 704 members in layoffs. Tisdale and Hughes enjoyed uninterrupted employment with A.A.F.P. from May 1989, to July 12, 1991, although 13 Local 704 members were laid off, and at the time of their layoff 5 Local 704 members were also laid off. They were also retained when others with more seniority were laid off. It is also uncontested that the layoff was economic in nature. Therefore the only remaining factor is their selection. The employer contends that Tisdale and Hughes would have been laid off had they been Local 704 members and offers documentary evidence to show that many 704 members were laid off before them.

The Company also offered evidence that although the Union wanted it to lay off travelers first, this request was ignored repeatedly and selection was based on job duration and ability. Moreover, the General Counsel offered no evidence that Hughes and Tisdale were selected for layoff over less qualified 704 members at the Ford Motor Company job. Therefore, I credit the employers' witnesses over those of

General Counsel and find that Tisdale and Hughes would have been laid off notwithstanding their traveler status.

Therefore, because counsel for the General Counsel did not prove, by a preponderance of the evidence that the Charging Parties were laid off because of their traveler status and because Respondents' carried their *Wright Line* burden, I will dismiss all allegations in the complaint.

CONCLUSIONS OF LAW

1. Respondent A.A.F.P., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Sprinkler Fitters and Apprentices, Local Union No. 704 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not engaged in any violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act.

[Recommended Order for dismissal is omitted from publication.]